Public Prosecutor v Guan Sheng Trading Sdn Bhd

HIGH COURT (JOHOR BAHRU) — CRIMINAL APPEAL NO 41-84-1994
ABDUL MALIK ISHAK J
10 JANUARY 1996

Customs and Excise *— Forfeiture — Lorry used in commission of offence — Whether magistrate should have considered whether an offence under s 135(1)(g) of Customs Act 1967 was made out — Whether lorry should be released to owner — Duty of magistrate in proceedings pursuant to s 128(4) of the Customs Act 1967*

Customs and Excise *— Forfeiture — Failing to declare dutiable goods — Owner of lorry pleading innocence — Whether owner entitled to return of lorry — Whether forfeiture of lorry used in commission of an offence mandatory — Customs Act 1967 s 127(1)*

Evidence *— Burden of proof — Presumption — Whether burden of proof shifts to carrier of uncustomed goods — Customs Act 1967 s 119*

Words and Phrases *— 'Fraudulent' — Customs Act 1967 s 135(1)(g)*

On 10 December 1991, a motorlorry and trailer arrived at the import examination bay of the Johor Bahru customs from Singapore. An examination was conducted and 450 pieces of raw particle boards ('the boards') and several other goods were discovered. Only the boards tallied with the declaration of imported goods (exh P1). A hearing was conducted by summons under s 128(4) of the Customs Act 1967 ('the Act') and at the conclusion of that hearing, the magistrate released the motorlorry and the tralier to the owners (the respondent in this case). Although the summons in support of the proceedings under s 128(4) of the Act specifically referred to an offence under s 135(1)(g) of the Act which was said to have been committed and no prosecution was instituted thereunder, the magistrate did not consider whether an offence would arise under 135(1)(g) of the Act. The prosecution appealed.

Held, allowing the appeal:

(1) In proceedings pursuant to s 128(4) of the Act, the function of the magistrate was to examine the matter pertaining to the claim by the owner of the goods seized. In doing so, he had to satisfy himself that first, an offence against the Act had been committed and secondly, either (i) the goods were the subject mater of the offence, or (ii) where the claim related to the conveyance, such conveyance was used in the commission of the offence (see p 25H–I); *Keng Soon Finance Bhd v Pegawai Kanan Kastam, Johore Bahru* [1981] 2 MLJ 249 followed.

(2) Once an intention to defraud the government of duties or to evade any prohibition was established by the prosecution, an offence under s 135(1)(g) of the Act was said to have been committed and it was the duty of the prosecution to prove that

A the defendant was concerned in any fraudulent evasion (see p 26C–27B); *Loh Chak Wan v PP* [1939] MLJ 84 and *R v Green (Harry Rodney)* [1975] 3 All ER 1011 followed.

(3) In s 135(1)(g) of the Act, 'fraudulent' meant that a false representation had been made (i) knowingly; or (ii) without
B believe in its truth; or (iii) recklessly, careless whether it was true or false (see p 27C–28C); *Mohamed Taiyob v PP* [1947] MLJ 101, *Derry v Peek* (1889) 14 App Cas 337 and *A-G's Reference (No 1 of 1981)* [1982] 2 All ER 417 followed.

(4) Fraudulent evasion was established if the prosecution proved
C fraudulent conduct in the sense of dishonest conduct deliberately intended to evade prohibition or restriction with respect to, or the duty chargeable on, the goods. While it was the duty of the prosecution to prove the intent to defraud, the intent could be presumed from the evidence (see p 31B–F); *A-G's Reference (No 1 of 1981)* [1982] 2 All ER 417 and *Lim Kim Chai v PP* [1963]
D MLJ 26 followed.

(5) On the question of proof and the likely presumptions which could be invoked for the proceedings under s 128(4) of the Act in this case, the court might by reason of s 128(5) of the Act, invoke the use of s 119 of the Act. Based on the application of
E s 119 of the Act, the burden of proof thereof should lie on the respondent and it was for the respondent to show the court that (i) the customs duties had been paid in relation to the goods; or (ii) the goods had been lawfully imported; or (iii) the goods were exempt from duty under s 14 of the Act. On the facts of the case the respondent had failed to discharge the burden of proof that had
F shifted to them under s 119 of the Act (see p 28H–30E); *Keng Soon Finance Bhd v Pegawai Kanan Kastam, Johore Bahru* [1981] 2 MLJ 249 and *Lau Kieng Chung v PP* [1993] 3 MLJ 295 followed; *PP v Chieng Ung Kai* [1993] 1 MLJ 21 not followed.

(6) In this case the magistrate in an apparent oversight failed to take
G into account the evidence of fraud on available evidence and there was abundant material available to hold that there was indeed fraud perpetrated (see p 31G–H).

(7) The innocence of the respondent would not entitle them to the return of the motorlorry and the trailer. The court strictly
H construed s 127(1) of the Act against the respondent. The goods were the subject matter of an offence under s 135(1)(g) of the Act and the motorlorry together with the trailer came within the definition of 'goods' in s 2 of the Act as 'goods' included 'a conveyance of any kind in any circumstances'. As the motorlorry and the trailer were used in the commission of such offence,
I consequently, it was mandatory to forfeit both the said vehicles (see p 32G–I and 34B); *Keng Soon Finance Bhd v Pegawai Kanan Kastam, Johore Bahru* [1981] 2 MLJ 249, *Yap Yoon Lin v R* [1954] MLJ 59, *Sinjo Credit & Leasing Sdn Bhd v Minister of Finance Malaysia* [1987] 2 CLJ 263 and *R v Ng Hee Weng & Ors* [1956] MLJ 85 followed.

Per curiam:

Under s 127(1) of the Act, notwithstanding that no person might have been convicted of an offence, forfeiture was mandatory so long as 'the goods were the subject matter of or were used in the commission of the offence' (see p 34D).

[Bahasa Malaysia summary

Pada 10 Disember 1991, suatu lori dan trailer telah tiba di pusat pemeriksaan impot di kastam Johor Bahru dari Singapura. Suatu pemeriksaan telah dijalankan dan 450 keping papan partikel ('papan tersebut') dan beberapa jenis barangan lain telah dijumpai. Suatu perbicaraan telah dijalankan melalui saman di bawah s 128(4) Akta Kastam 1967 ('Akta tersebut') dan di akhir pembicaraan tersebut, majistret telah memerintahkan agar motorlori dan trailer dikembalikan kepada tuanpunya (penentang dalam kes ini). Walaupun saman yang menyokong prosiding di bawah s 128(4) Akta tersebut telah secara spesifik merujuk kepada kesalahan di bawah s 135(1)(g) Akta tersebut yang dikatakan telah dilakukan dan bahawa tidak ada pendakwaan yang telah dimulakan, majistret tidak mempertimbangkan sama ada kesalahan telah timbul di bawah s 135(1)(g) Akta tersebut. Pihak pendakwa telah merayu.

Diputuskan, membenarkan rayuan tersebut:

(1) Dalam prosiding di bawah s 128(4) Akta tersebut, fungsi majistret adalah untuk meneliti perkara yang berkaitan dengan tuntutan oleh tuanpunya barangan yang diambil. Dalam berbuat demikian, dia mesti memuaskan diri sendiri bahawa pertamanya, suatu kesalahan di bawah Akta tersebut telah dilakukan dan keduanya, sama ada (i) barangan tersebut adalah hal perkara kesalahan tersebut; atau (ii) di mana kesalahan itu berkaitan dengan kenderaan, maka kenderaan tersebut telah digunakan dalam perlakuan kesalahan tersebut (lihat ms 25H–I); *Keng Soon Finance Bhd v Pegawai Kanan Kastam, Johore Bahru* [1981] 2 MLJ 249 diikut.

(2) Sebaik sahaja suatu niat untuk memfraudkan kerajaan berkenaan dengan duti ataupun untuk mengelakkan apa-apa larangan telah dibuktikan oleh pihak pendakwa, suatu kesalahan di bawah s 135(1)(g) Akta tersebut akan dikatakan telah berlaku dan adalah tugas pihak pendakwa untuk membuktikan bahawa defendan adalah terlibat dengan pengelakkan secara fraud (lihat ms 26C–27B); *Loh Chak Wan v PP* [1939] MLJ 84 and *R v Green (Harry Rodney)* [1975] 3 All ER 1011 diikut.

(3) Di bawah s 135(1)(g) Akta tersebut, perkataan 'secara fraud' bermakna satu representasi palsu telah dibuat (1) dengan pengetahuan; atau (2) tanpa kepercayaan akan kebenarannya; atau (3) secara cuai dan abai tanpa menghiraukan sama ada ianya adalah benar atau palsu (lihat ms 27C–28C); *Mohamed*

Taiyob v PP [1947] MLJ 101, *Derry v Peek* (1889) 14 App Cas 337 dan *A-G's Reference (No 1 of 1981)* [1982] 2 All ER 417 diikut.

(4) Pengelakkan secara fraud adalah dibuktikan jika pihak pendakwa membuktikan kelakuan fraud dalam makna kelakuan kurang jujur yang sengaja dan dengan niat mengelakkan larangan atau sekatan yang berhubung dengan, atau duti yang akan dikenakan pada, barangan. Sedangkan ianya tugas pihak pendakwa untuk membuktikan niat untuk memfraud, niat itu boleh dianggap dati keterangan (lihar ms 31B–F); *A-G's Reference (No 1 of 1981)* [1982] 2 All ER 417 dan *Lim Kim Chai v PP* [1963] MLJ 26 diikut.

(5) Mengenai persoalan 'bukti' dan anggapan yang mungkin digunakan untuk prosiding di bawah s 128(4) Akta tersebut di dalam kes ini, mahkamah boleh, atas dasar s 128(5) Akta tersebut, memakai s 119 Akta tersebut. Berdasarkan pemakaian s 119 Akta tersebut, beban pembuktian adalah di atas penentang dan ianya bergantung kepada penentang untuk menunjukkan mahkamah bahawa (i) duti kastam telah dibayar berkaitan dengan barangan tersebut; ataupun (ii) barangan tersebut telah diimportkan secara sah; ataupun (iii) barangan tersebut telah dikecualikan daripada duti di bawah s 14 Akta tersebut. Berdasarkan fakta kes ini, penentang telah gagal menjelaskan beban pembuktian yang telah beralih kepada mereka di bawah s 119 Akta tersebut (lihat ms 28H–30E); *Keng Soon Finance Bhd v Pegawai Kanan Kastam, Johore Bahru* [1981] 2 MLJ 249 dan *Lau Kieng Chung v PP* [1993] 3 MLJ 295 diikut; *PP v Chieng Ung Kai* [1993] 1 MLJ 21 tidak diikut.

(6) Dalam kes ini majistret dalam satu kesilapan, telah gagal mempertimbangkan keterangan mengenai fraud berdasarkan keterangan yang ada dan terdapat keterangan yang lebih daripada mencukupi untuk membuktikan bahawa fraud telah dilakukan (lihat ms 31G–H).

(7) Ketidaksalahan penentang tidak akan bermakna bahawa mereka mempunyai hak untuk mendapatkan kembali motorlori dan trailer itu. Mahkamah akan memberikan kesan sepenuhnya kepada s 127(1) Akta tersebut. Barangan tersebut merupakan hal perkara kesalahan di bawah s 135(1)(g) Akta tersebut dan motorlori bersama dengan trailer tersebut termasuk dalam takrif 'barangan' dalam s 2 Akta tersebut oleh kerana 'barangan' merangkumi 'kenderaan yang berbagai jenis yang digunakan dalam mana-mana keadaan'. Oleh kerana motolori dan trailer tersebut telah digunakan dalam perlakuan kesalahan tersebut, maka ianya adalah mandatori untuk melucuthakkan kedua-dua kenderaan tersebut (lihat ms 32G–I dan 34B); *Keng Soon Finance Bhd v Pegawai Kanan Kastam, Johore Bahru* [1981] 2 MLJ 249, *Yap Yoon Lin v R* [1954] MLJ 59, *Sinjo Credit & Leasing Sdn Bhd v Minister of Finance Malaysia* [1987] 2 CLJ 263 dan *R v Ng Hee Weng & Ors* [1956] MLJ 85 diikut.

Per curiam:

Di bawah s 127(1) Akta tersebut, tidak kira bahawa tiada sesiapa yang sabit kesalahannya, perlucuthakan adalah mandatori asalkan 'barangan tersebut adalah hal perkara atau telah digunakan dalam perlakuan kesalahan tersebut' (lihat ms 34D).]

Notes

For cases on forfeiture of uncustomed goods, see 6 *Mallal's Digest* (4th Ed) paras 79–80.

For a case on burden of proof in relation to presumptions, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) para 326.

Cases referred to

A-G's Reference (No 1 of 1981) [1982] 2 All ER 417 (folld)
Aw Yock Beng v PP [1947] MLJ 121 (refd)
Cheng Kee Huat & Anor v PP [1948] 14 MLJ 53 (refd)
Derry v Peek (1889) 14 App Cas 337 (folld)
Kan Sik Fong v PP [1961] MLJ 163 (refd)
Keng Soon Finance Bhd v Pegawai Kanan Kastam, Johore Bahru [1981] 2 MLJ 249 (folld)
Lau Kieng Chung v PP [1993] 3 MLJ 295 (folld)
Lim Kim Chai v PP [1963] MLJ 26 (folld)
Loh Chak Wan v PP [1939] MLJ 84 (folld)
Mohamed Taiyob v PP [1947] MLJ 101 (folld)
Ng Eng Kooi & Anor v PP [1970] 1 MLJ 267 (folld)
PP v Chieng Ung Kai [1993] 1 MLJ 21 (not folld)
PP v Lee Wye Kheng [1978] 1 MLJ 38 (refd)
R v Green (Harry Rodney) [1975] 3 All ER 1011 (folld)
R v Ng Hee Weng & Ors [1956] MLJ 85 (refd)
Russell v Ledsam (1845) 14 M & W 574 (refd)
Soong Chee Kong v PP [1951] MLJ 5 (refd)
Sinjo Credit & Leasing Sdn Bhd v Minister of Finance Malaysia [1987] 2 CLJ 263 (folld)
Syed Abdullah v PP [1964] MLJ 48 (refd)
Yap Yoon Lin v R [1954] MLJ 59 (refd)

Legislation referred to

Customs Act 1967 ss 2, 114, 119, 127, 128, 129, 135
Customs Ordinance 1952 ss 110, 123
Customs Enactment 1937 s 106
Customs and Excise Act 1952 [UK] s 304(b)
Customs and Excise Management Act 1979 [UK] s 170(2)(a)
Criminal Procedure Code (FMS Cap 6) s 158, 173
Evidence Act 1950 s 114(g)
Johore Trade and Customs Enactment s 39

Allaudeen bin Ismail (Deputy Public Prosecutor for Customs) for the Public Prosecutor.

Lau Kok Guan (*Lau Kok Guan & Partners*) for the respondent.

Abdul Malik Ishak J: A hearing under s 128(4) of the Customs Act 1967 ('the Act') was conducted by summons before the learned magistrate, Magistrate's Court, Johor Bahru and at the conclusion of that hearing, the learned magistrate ordered the release of motorlorry JCK 7549 ('the motorlorry') and trailer T/J 4009 ('the trailer') to the respondent. Being dissatisfied, the Public Prosecutor appealed.

The facts in so far as they are relevant to this appeal are that on 10 December 1991 at about 5.30pm the motorlorry and the trailer arrived at the import examination bay of the Johor Bahru customs from Singapore. The trailer was covered with canvas and when the customs officer ordered the canvas to be removed, two male Indians who were the driver and attendant of the motorlorry and the trailer respectively, refused to comply and, in fact, they conveniently left the scene. Before the Indian attendant left the scene he did say that the items in the trailer were as declared in exh P1. Incidentally exh P1 relates to a declaration of imported goods. Suspecting that something was amiss, the customs officer reported to his superior who then directed a 100% check which revealed the presence of 450 pieces of raw particle boards ('the boards') and this tallied with what was declared in exh P1. Apart from that, the customs also recovered the following items ('the goods'):

(1) 586 pieces of inner tubes;

(2) 80 pieces of sport rims; and

(3) 10 pieces of sport rims with tyres.

The respondent asserted that they were the owners of the motorlorry and the trailer but that they were not interested in the boards and the goods. The goods were sold at RM19,000 as reflected in the receipt (exh P13) while the boards were returned to the importer (P14). Pending the inquiry under s 128(4) of the Act, the motorlorry and the trailer were released to the lawyer (P15) who acted on behalf of the respondent. From the appeal record at p 11 thereof, the learned magistrate ordered the forfeiture of the goods at the behest of the respondent. Be that as it may, it is pertinent to point out that the boards together with the goods were all put inside carton boxes as shown in photographs P2A, P2B and P2C. However the boxes containing the goods were placed in the front portion of the trailer, immediately behind the motorlorry itself.

Abdul Hamid FJ (as he then was) in *Keng Soon Finance Bhd v Pegawai Kanan Kastam, Johore Bahru* [1981] 2 MLJ 249 especially at p 250 stated in erudite terms the duty of the presiding magistrate in proceedings under s 128(4) of the Act. This was what his Lordship said:

> It must be noted that in proceedings pursuant to s 128(4) of the Act, the function of the president or the magistrate, as the case may be, is to examine the matter pertaining to the claim by the owner of the goods seized. In doing so he has to satisfy himself that firstly, an offence against the Act has been committed and secondly, either (a) the goods were the subject matter of the offence, or (b) where the claim relates to the conveyance, such conveyance was used in the commission of the offence.

Now, even though the summons in support of the proceedings under s 128(4) of the Act specifically refer to an offence under s 135(1)(g) of the Act which was said to have been committed and no prosecution was instituted thereunder, yet the learned magistrate did not address his mind as to whether an offence, on the available evidence, would arise under s 135(1)(g) of the Act. A perusal of the grounds written by the learned magistrate would clearly show this oversight. Section 135(1)(g) of the Act enacts as follows:

> 135(1) Whoever:
>
> (g) is in any way knowingly concerned in any fraudulent evasion or attempt at fraudulent evasion of any customs duty, or in evasion or attempt at evasion of any prohibition of import or export.

Once an intention to defraud the government of duties or to evade any prohibition can be established by the prosecution, an offence under s 135(1)(g) of the Act is said to have been committed and 'it is the duty of the prosecution to prove that the defendant is concerned in any fraudulent evasion' (see dicta of Thomas CJ in *Loh Chak Wan v PP* [1939] MLJ 84). The English Court of Appeal in the case of *R v Green (Harry Rodney)* [1975] 3 All ER 1011, boldly held that goods which are prohibited do not cease to be prohibited on their being seized by the customs authority and the accused can be guilty of fraudulent evasion of prohibition on importation even if the prohibited goods imported by him have been substituted and he deals with these goods subsequently with the requisite fraudulent intention. In that case a crate arrived at Southampton on 6 August 1973 on board a ship addressed to a person in London. That crate was placed in a shed for unaccompanied luggage awaiting collection. The appellant and another man filled in the necessary forms required for customs clearance. Among the completed forms was a purported inventory in which it was stated that the crate contained a child's writing desk and similar terms. The forms were sent to forwarding agents for clearance. On 20 August 1973, the customs authorities, having received the forms, opened the crate which was found to contain a quantity of cannabis in hessian sacks. They removed the cannabis and filled the bags with peat and paper. On 6 September 1973 the crate was collected by a firm of removers who took it to their warehouse. From there it was collected by a haulier whose name had been supplied by the appellant to other persons engaged in the operation. On 4 September 1973, the appellant rented a garage under a false name. On 6 September 1973, the crate was delivered by the haulier to the garage where it was stored. The appellant was subsequently charged with being knowingly concerned in the fraudulent evasion of the prohibition on importation of cannabis, contrary to s 304 of the Customs and Excise Act 1952. The judge directed the jury that if they found that the appellant had done any of the acts in question they should convict. The appellant was convicted and appealed, contending that the commission of any of the acts after the seizure of the cannabis on 20 August 1973 could not render him guilty of the offence charged which had by then become impossible to perform. Ormrod LJ delivered the judgment of the Court of Appeal and his Lordship had this to say at p 1016d–f:

A The actus reus in this offence is being concerned in the evasion or the attempted evasion of a prohibition on the importation of the goods in question, not the successful evasion. All the necessary ingredients were proved or admitted: cannabis is a prohibited drug, it was imported in breach of the prohibition; so evasion was established. We accept counsel for the crown's argument that evasion is a continuing offence, that is that it did not B cease when the cannabis was seized by the authorities. Once imported, the evasion of the prohibition continues until the goods cease to be prohibited goods or, possibly, are re-exported. The renting of the garage, knowing that it was to be used to store the cannabis, completes the offence under s 304(b) of the Customs and Excise Act 1952. The trial judge's direction to the jury on this count therefore cannot be criticized.

C As to the meaning of 'fraudulent' appearing in s 135(1)(g) of the Act, Bostock Hill J in *Mohamed Taiyob v PP* [1947] MLJ 101 applied the meaning to that word as propounded by Lord Herschell in *Derry v Peek* (1889) 14 App Cas 337 in that for fraud to be proved it must be shown that a false representation has been made (i) knowingly; or (ii) without D belief in its truth; or (iii) recklessly or carelessly, whether it be true or false. Briefly, *Mohamed Taiyob v PP* was a case under s 39(1)(h) of the Trades and Customs Enactment Johore where the value of the textiles stated in the declaration form was lower than the value as assessed by the customs valuers. Fraudulent evasion was held not established because the value stated was only slightly lower but overall it was not very much below the E true value considering that the market in textile was falling.

Lord Lane CJ in *A-G's Reference (No 1 of 1981)* [1982] 2 All ER 417 explained that the concept of fraud may produce quite remarkable results. This was how his Lordship put it at p 421:

F If the view of the judge in the present case on the meaning of the word 'fraudulent' is correct, it produces some quite remarkable results. Evasion may, and often does, commence before the customs control point is reached. Indeed, if goods are in transit, that point may never be reached. *R v Borro & Anor* [1973] Crim LR 513 CA, is an example of that. Another example is to be found in *R v Smith (Donald)* [1973] 2 All ER 1161 at 1167; [1973] QB 924 at 935. Willis J, delivering the judgment of the court, said:

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> 'It seems quite clear that the Act contemplates that goods can be imported before they are either landed from a ship or unloaded from an aircraft ... it is plain that goods entering the country by air are imported before they are unloaded, as are goods brought by sea before they are landed ... It is sufficient to say that in this case we have no doubt that H the cannabis in question was imported when the aircraft bringing it landed at Heathrow, and was exported when it was placed on board the BOAC aircraft and that it is quite irrelevant to the question of importation that it remained between unloading and reloading in a customs area.'

I The court in that case was concerned with the Customs and Excise Act 1952, but the wording was similar to that of the 1979 Act.

What had happened in *Smith*'s case was that packets containing cannabis addressed to a person in Bermuda were put on board an aircraft in Kenya which was bound for Heathrow Airport. At Heathrow the packets were

> unloaded and, without leaving the customs area, were put on board a second aircraft bound for Bermuda. The cannabis was discovered when the packets arrived in Bermuda. The defendant was charged with being knowingly concerned in the fraudulent evasion of the prohibition against the importation of cannabis. There was no possibility of deceit being practised on any customs officer. If deceit is a requirement, then in this sort of case there can never be a conviction under this subsection of the Act. This seems contrary to good sense. Moreover, if actual deceit of a customs officer is required, then no one involved in the importation after the customs point has been passed could normally be convicted. But importation is a continuing offence, and consequently this interpretation might mean that the eventual recipients and others who may have been primarily responsible for the evasion might escape justice.
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> It seems to us to be a misinterpretation of parliament's intention, and a path to absurdity, to make guilt depend on whether a customs officer is met and deceived on the one hand, or simply intentionally avoided on the other.

Now, the facts in *A-G's Reference (No 1 of 1981)* [1982] 2 All ER 417 were that the defendants unloaded a quantity of smuggled cannabis from a cargo vessel docked at a quayside in the early hours of the morning when there were normally no customs officials on duty. Unknown to the defendants, they were observed by customs officials keeping a special watch on the defendants and they were pursued and stopped when they hurriedly drove off with the cannabis. They were subsequently charged under s 170(2)(a) of the Customs and Excise Management Act 1979 with being knowingly concerned in a fraudulent evasion of the prohibition on the importation of cannabis. The trial judge ruled that for the evasion to be 'fraudulent' it had to be shown that the accused had actually deceived or attempted to deceive the customs officials and there being no evidence as to this, they were acquitted. The attorney general referred to the Court of Appeal for its opinion on the true effect of the word. Lord Lane CJ rightly held that fraudulent evasion is established if the prosecution proved fraudulent conduct in the sense of dishonest conduct deliberately intended to evade the prohibition or restriction with respect to, or the duty chargeable on, the goods. His Lordship was of the view that there was no need to prove deceit on customs officials because in the material legislation that was under review there was no such reference.

On the question of 'proof' and the likely presumptions which can be invoked for proceedings under s 128(4) of the Act, his Lordship Abdul Hamid FJ in *Keng Soon Finance Bhd v Pegawai Kanan Kastam, Johore Bahru* [1981] 2 MLJ 249 had this to say at p 250:

> ... As regards proof it is for the court to consider the whole of the matter including, inter alia, the goods found in the conveyance, the nature of such goods, whether dutiable or otherwise, and all the circumstances surrounding the particular case. The court may for purposes of such consideration invoke any presumption of law provided under the Act as and when it is applicable. As for example, by reason of s 128(5) of the Act, s 119 of the Act shall apply in the determination of a matter pursuant to s 128(4).

Thus, when one applies s 119 of the Act, 'the burden of proof thereof shall lie on the defendant (respondent)'. It is for the respondent to show to the court that:

(1) customs duties have been paid in regard to the goods; or

(2) the goods have been lawfully imported; or

(3) the goods are exempt from duty under s 14 of the Act.

It is a correct appraisal of the evidence for me to say that the respondent had failed to discharge the burden of proof that had been shifted to them under s 119 of the Act.

In *PP v Chieng Ung Kai* [1993] 1 MLJ 21, the facts were that customs officers, acting on information received, conducted a raid at a place and saw four persons in the process of unloading goods from a lorry to a store. On approaching, the four people fled from the scene. A quantity of beer and cigarettes was discovered in the lorry and the store. The goods were seized by the customs officers on suspicion of non-payment of duty. Subsequently, the respondent turned up at the scene and admitted to the ownership of the goods seized. The respondent was then charged in the magistrate's court under s 135(1)(e) of the Act for being knowingly concerned in conveying uncustomed goods with intent to defraud the government of any duties thereon. He was, however, acquitted and discharged by the magistrate at the conclusion of the prosecution's case without his defence being called on the ground that the charge could not stand. The prosecution filed an appeal in the High Court on the grounds, inter alia, that the learned magistrate had erred in not amending the charge to one under s 135(1)(d) of the Act, as was required of him by ss 158 and 173(h) of the Criminal Procedure Code (FMS Cap 6). Section 135(1)(d) of the Act provides, inter alia, that 'whoever is knowingly in possession of any uncustomed goods is guilty of an offence'. The prosecution based their argument on the evidence of a prosecution witness who stated that while at the scene, in answer to his question, the respondent had admitted that the goods belonged to him. On the question of uncustomed goods, the prosecution relied on s 119 of the Act to put the burden on the respondent to prove that the goods were not uncustomed goods. Abdul Kadir Sulaiman J dismissed the appeal as he felt that a charge under s 135(1)(d) would not be appropriate as at the time the respondent admitted to the ownership of the goods, he had already parted with the possession of the goods. At that time the goods were already seized and put under the control of the customs. His Lordship further refused to accede to the view as proposed by the prosecution that s 119 of the Act could be used to shift the burden to the respondent to show that the goods were not uncustomed goods. In view of the definition of 'uncustomed goods' in s 2 of the Act, that is, 'goods in respect of which a breach of the provisions of this Act or of any subsidiary legislation made thereunder has been committed', his Lordship was of the view that the prosecution had to first show that there was such a breach before s 119 of the Act could apply. His Lordship was further of the view that the fact that the respondent could not show proof of payment of duty could not be used to show that the goods were uncustomed.

The view of Abdul Kadir Sulaiman J in *PP v Chieng Ung Kai* [1993] 1 MLJ 21 was not followed by Steve Shim J in *Lau Kieng Chung v PP* [1993] 3 MLJ 295. The appellant in *Lau Kieng Chung v PP* was charged and convicted under s 135(1)(e) of the Act and was fined RM50,000 in default six month's imprisonment. The appellant appealed against both conviction and sentence on the grounds, inter alia, that (i) the magistrate was wrong in holding that the goods were uncustomed goods; (ii) the magistrate failed to consider whether the appellant had discharged the onus that he had no knowledge that the goods were uncustomed goods; and (iii) the magistrate had erred in finding that there was intention by the appellant to defraud the government. His Lordship Steve Shim J set out the ingredients necessary to sustain a charge under s 135(1)(e) of the Act, namely, (i) that the accused person was knowingly concerned in conveying uncustomed goods; and (ii) that in doing so, he had intended to defraud the government. In order to establish the first ingredient, his Lordship felt that it was necessary to prove firstly, that there was a conveyance of the goods by the accused person; secondly, that at the time of such conveyance, the goods were uncustomed goods; and thirdly, that the accused person knew that the goods he conveyed were uncustomed goods. In order to establish that the goods were uncustomed at the time of the conveying, his Lordship felt that the prosecution was entitled to invoke s 119 of the Act to shift the burden of proof onto the accused if there was a dispute as to whether duties had been paid in respect of the goods. Section 119 of the Act did not raise any presumption, it merely shifted the burden of proving the matters specified therein to the accused.

Way back in 1970, the then Federal Court in *Ng Eng Kooi & Anor v PP* [1970] 1 MLJ 267 FC (Azmi LP, Suffian and Gill FJJ) ruled that under s 115 of the Customs Ordinance 1952 (the present s 119 of the Act) the fact that the rice, the subject matter of the offence, had not been lawfully imported was presumed unless the contrary was proved, although the section did not say so in many words.

It is not out of place to mention that s 119 of the Act was enacted and by its very existence statutory recognition was given to the possible difficulties faced by the customs in discharging their duties under the Act. If the legislature thought it fit to retain s 119 in the Act, then it is the function of this court to give effect to it. As Parke B aptly pointed out in *Russell v Ledsam* (1845) 14 M & W 574 at p 589 that:

> ... the province of the legislature is not to construe, but to enact; and their opinion, not expressed in the form of law as a declaratory provision would be, is not binding on courts, whose duty is to expound the statutes they (the legislature) have enacted.

In the introductory chapter in a book by *Craies on Statute Law* (5th Ed), the following illuminating passage appears at p 12:

> It would be no easy task to ascertain at what period and by what means the courts of law obtained the right of being the sole expositors of the statutes of the realm. In the early ages of the English system it appears that the line between the judiciary and the legislature was not distinctly marked. Originally the House of Lords and Commons sat together, and the courts of law were

A clearly subordinate to the parliament. A writ of error lay from them to the parliament, and they were accustomed even to consult parliament before they decided points of difficulty and importance. But it is now one of the axioms of our law that it is not only the 'right' but also the duty of the judiciary to expound and interpret doubtful provisions of our legislative enactments.

B Reverting to the question of an intent to defraud, Adams J in *Lim Kim Chai v PP* [1963] MLJ 26 had this to say:

> Raja Azlan Shah who appeared for the public prosecutor conceded that the prosecution had to prove the intent to defraud, but argued that intent could be presumed from the evidence (see the judgment of Denning LJ in *Welham*
C *v DPP* 44 Cr App R 124). In this submission the learned legal adviser is also correct. He argued that here the accused, who must be presumed to know what is dutiable and what is not, must have intended to defraud the government. He said that any person who goes through the customs gate with dutiable goods and does not declare them must, on the normal basis of the standards of the 'reasonable man', intend to evade the payment of duty,
D and that in itself is evidence of the necessary intention to defraud. He conceded that the learned president had not considered the question of the intention to defraud, but argued that there was abundant evidence on the record which established such an intent.

In another part of his judgment of the same case, Adams J boldly said:

E
> I would say at the outset that in my opinion any person who brings goods into the federation without declaring them or producing them to the customs does so at his own peril. It is the act of a prudent man to enquire, if he is in any doubt, from customs whether or not a specific article carries duty. If he does not do this, then he cannot complain if the prosecution ask the court to presume that in not doing so he intended to defraud the government.
F Therefore if a person is found, as was the accused in this case, in the federation conveying goods which carried duty and the duty on the goods he was carrying had not been paid, he cannot complain if at the end of the case for the prosecution he is called upon to make his defence to the charge that he conveyed such uncustomed goods knowingly and with intent to defraud the government.

G Applying the principles of law as discussed above, it is my finding that the learned magistrate in an apparent oversight failed to take into account the existence of fraud on the available evidence. I have given careful consideration to the submissions of both parties before me and found that there was an abundant material for me to hold that there was indeed fraud
H perpetrated by the two Indians. For convenience, it can be summarized as follows:

(1) Both the two Indians refused to open the canvas that covered the trailer when ordered by the customs officer;

I (2) The Indian attendant stated that the trailer contained items as reflected in exh P1, but, on examination other goods were found;

(3) Both the two Indians disappeared from the scene and subsequently warrants were issued for their arrests (exh P8);

(4) In the absence of the two Indians, the customs officer 'mengesyaki sesuatu barang cuba diseludupkan di dalam motorlori tersebut'; A

(5) PW1 testified that for the last 17 years as a customs officer never before had there been a refusal to remove the canvas from the trailer by a lorry driver when commandered to do so by him;

(6) PW1 testified that usually lorry drivers would immediately open the canvas to the lorry/trailer when ordered by him; and B

(7) The motorlorry with the trailer had just arrived from Singapore.

All these are elements of fraud and it would be a gross miscarriage of justice to hold otherwise. As Abdul Hamid FJ (as he then was) said in *Keng Soon Finance Bhd v Pegawai Kanan Kastam, Johore Bahru* [1981] 2 MLJ 249 at p 251: C

> On an enquiry pursuant to s 128(4) of the Act, the court shall examine all the evidence produced before it including that which may be tendered by the claimant in order to satisfy itself there is such proof. The court is competent in determining the matter before it to draw inferences from the facts proved. ... D

It was ingeniously argued that once the motorlorry and the trailer had arrived at the customs bay import check point, the customs were only concerned with the 'goods' carried in the vehicle and not the vehicle itself. The learned magistrate was particularly impressed with this submission E and he set these out in his grounds of judgment but, with respect, the learned magistrate failed to take into account the evidence of PW6 under re-examination when he said in strong terms that:

> Kastam hanya berminat terhadap barang semasa barang itu diimport. Sekiranya ada satu kesalahan di bawah Akta Kastam yang melibatkan lori F kastam juga berminat terhadap lori itu.

It is evidently clear from the evidence of PW6 that since those goods were found after a 100% examination the customs became interested in the motorlorry and the trailer. A vain attempt was made to impress upon me that the process of conveying the boards and the goods came to an abrupt G stop when the motorlorry and the trailer became stationary at the customs import bay. I fail to understand this submission. It is really mind-boggling to think that being stationary would put an end to conveying. The fact that the motorlorry and the trailer were stationary when they were at the import bay would not by itself interrupt the process of conveying the boards and the goods from Singapore to Johor Bahru (see a similar approach by H Spenser Wilkinson J in *Yap Yoon Lin v R* [1954] MLJ 59 especially at p 61). Moreover, the word 'goods' as defined in s 2(1) of the Act 'includes animals, birds, fish, plants and all kinds of moveable property' and on the authority of *R v Ng Hee Weng & Ors* [1956] MLJ 85 as applied in *Keng Soon Finance Bhd v Pegawai Kanan Kastam, Johore Bahru* [1981] I 2 MLJ 249 it would 'include a conveyance of any kind in any circumstances'. To borrow the words of Abdul Hamid FJ (as he then was) in *Keng Soon Finance Bhd v Pegawai Kanan Kastam, Johore Bahru* at p 251:

> ... The law is clear in that 'goods' referred to in that section refers to goods seized pursuant to s 114 of the Act and which evidently includes receptacles, packages, conveyances, etc.

A point was advanced that the prosecution failed to call the two Indians and one Yeo Lai Meng to the stand and their absence has cut the umbilical cord of the prosecution's case, so to speak. There is no merit in this argument. Warrants for the arrest of these two Indians had been issued (exh P8) and their names were boldly printed therein in complete reliance on the passports left by them in the motorlorry in their haste to depart from the scene (see exhs P6A, P6B and P6C). Before the learned magistrate (see p 28 of the appeal record), the prosecution informed the court that the subpoena for Yeo Lai Meng had been served and, in view of his absence, the prosecution promptly applied for a warrant for his arrest. The learned magistrate had acceded to the prosecution's request and, accordingly, issued a warrant for the arrest of Yeo Lai Meng. *Omnia praesumuntur contra spoliatorem* — if a man wrongfully withholds evidence, every presumption to his disadvantage consistent with the facts admitted or proved will be adopted. Adverse inference can only be drawn if there is withholding of evidence and not merely on account of failure to obtain evidence. Here, clearly the prosecution did not withhold the names of these two Indians nor that of Yeo Lai Meng. How could the presumption under s 114(g) of the Evidence Act 1950 be triggered off in favour of the respondent? As a claimant, the respondent was not restrained to tender evidence to show that the goods fell within those categories as set out earlier in this judgment, namely, that it fell within the scope of s 119 of the Act. No evidence was forthcoming from the respondent.

It seems to me that the respondent was pushing the blame on the two Indians. The respondent says that as owners of the motorlorry and the trailer they were not responsible for the acts of the two Indians and what those two Indians did should not tie them down criminally. The short answer is provided in *R v Ng Hee Weng & Ors* [1956] MLJ 85 where notwithstanding that the motorcar that was used in the commission of the offence was a hired car, it was held that it did not preclude the court in forfeiting it. The headnotes read as follows:

> Where a vehicle used in the commission of an offence had been seized by a customs officer under s 110 of the Customs Ordinance 1952 (the present s 114 of the Customs Act 1967), and if it is proved to the satisfaction of the court that the vehicle had been so used, s 123 of the said Ordinance (the present s 127 of the Customs Act 1967) gave no discretion to the court, but render an order for forfeiture mandatory.

In *Sinjo Credit & Leasing Sdn Bhd v Minister of Finance Malaysia* [1987] 2 CLJ 263, where there was an application for leave to apply for an order of certiorari to quash the order made by the Minister of Finance dated 28 July 1985 when the applicant's appeal under s 129 of the Act for the return of the applicant's motor vehicle JBB 2833 was rejected by the respondent, Shankar J (now JCA) said:

> The mere fact that the owner of a vehicle was innocent of the offence for the commission of which the vehicle was used, does not entitle him as a matter of right to have an order from the minister for the return of his vehicle to him.

Likewise here, the innocence of the respondent will not entitle them to the return of the motorlorry and the trailer. This court strictly construes s 127(1) of the Act against the respondent.

It is my finding, after considering the available evidence, that an offence against the Act has been committed. The goods were the subject matter of an offence under s 135(1)(g) of the Act and the motorlorry together with the trailer were used in the commission of such offence and, consequently, it was mandatory to forfeit both the motorlorry and the trailer.

It is germane to state that under s 106 of the then Customs Enactment 1937, the trial court was given a wide discretion as reflected in *Soong Chee Kong v PP* [1951] MLJ 5 to decide whether or not to forfeit even if the goods were involved in smuggling and it was for this reason that Taylor J was prompted to say that forfeiture was not only unjust but unduly harsh. However under the present s 127(1) of the Act, forfeiture is made mandatory so long as 'the goods were the subject matter of or were used in the commission of the offence' (see the related cases on the subject matter: *PP v Lee Wye Kheng* [1978] 1 MLJ 38, *Kan Sik Fong v PP* [1961] MLJ 163, *Syed Abdullah v PP* [1964] MLJ 48, *Aw Yock Beng v PP* [1947] MLJ 121 and *Cheng Kee Huat & Anor v PP* [1948] MLJ 53). The words 'notwithstanding that no person may have been convicted of such offence' appearing in s 127 (1) of the Act make it inevitable that forfeiture cannot be avoided even if the accused was acquitted of the charge against him provided the trial court is satisfied that 'the goods were the subject matter of or were used in the commission of the offence.' As Syed Agil Barakbah J (as he then was) said in *PP v Lee Wye Kheng* at p 40:

> With regard to the cross-appeal by the respondent against the order of forfeiture of the exhibits, I am in agreement with the learned president. The exhibits have been proved to be prohibited goods and found in the possession of the respondent. The trial court was satisfied that an offence against the Act has been committed, ie the gold coins were imported by person or persons unknown without licence. The respondent was acquitted on the ground that he had no knowledge that they were prohibited. The exhibits were the subject matter of the offence. They still remain prohibited goods. They were liable to forfeiture and ought to be forfeited even though the respondent was not convicted of the offence charged. I am of the opinion that the provision of s 127 of the Customs Act applies on all fours.

It goes without saying that the appeal by the Public Prosecutor succeeds.

Appeal allowed.

Reported by Lew Chee Seong